United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7187

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 75-7187

JEAN D'AGOSTA,

Plaintiff-Appellee,

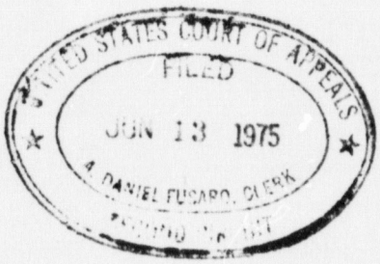
vs.

W. T. GRANT COMPANY,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF OF PLAINTIFF-APPELLEE



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Statement of Issues

1. Where Congress established the jurisdiction of United States District Courts over truth-in-lending actions, did the Court below properly accept jurisdiction of the consumer's claims?

2. Where the W. T. Grant Company failed and refused to provide the consumer with congressionally-mandated information, did the District Court properly find violations of the Consumer Credit Protection Act, 15 U.S.C. §1601 et seq. and §36-393 et seq. of the Connecticut General Statutes?

STATEMENT OF THE CASE

The Company's statement of the case sets forth the prior proceedings.

However, its assertion on page 2 that "[p]laintiff failed to pay her obligation on those contracts" is irrelevant to the subject matter of this appeal and disputed by Mrs. D'Agosta. App. 11a-13a.

The Company's statement of the case omits mention of the fact that the Company did not oppose, in the district court, Mrs. D'Agosta's motion for partial summary judgment. App. 1a-3a.

ARGUMENT

I. TITLE 15 U.S.C. §1640(e) ESTABLISHED THE JURISDICTION OF THE DISTRICT COURT.

A. INTRODUCTION

In Title 15 U.S.C. §1640(e), Congress established the jurisdiction of United States District Courts to redress violations of truth in lending. Congress' authority to create this jurisdiction--and to withdraw it--is, of course, supreme and exclusive. Constitution, Article III, Section 1; Sheldon vs. Sill, 49 U.S. (8 How.) 651-652 (1850); Lockerty vs Phillips, 319 U.S. 182, 187-188 (1943).

Courts are barred from countenancing any limitation, modification, or repeal of the jurisdiction so created unless Congress speaks with an unmistakable voice; "repeals by implication are not favored". Lynch vs Household Finance Corporation, 405 U.S. 538, 549 (1972) (quoting Posadas vs. National City Bank, 296 U.S. 497, 503 (1936). At no time has Congress withdrawn, limited or modified the federal jurisdiction conferred by §1640(e), either in exempted or non-exempted transactions. Indeed the legislative history of the Act, as well as its administration by the Federal Reserve Board, demonstrates that the District Court was correct in accepting jurisdiction pursuant to 15 U.S.C. §1640(e).

B. THE FEDERAL RESERVE BOARD'S INTERPRETATION AND ADMINISTRATION OF THE TRUTH IN LENDING ACT SUPPORT THE DISTRICT COURT'S DECISION TO ACCEPT JURISDICTION OF THE CONSUMER'S CLAIMS.

12 C.F.R. §226.12(c), issued by the Federal Reserve Board to implement 15 U.S.C. §1633, states:

> "In order to assure that the concurrent jurisdiction of Federal and State courts created in section 130(e) of the Act shall continue to have substantive provisions to which such jurisdiction shall apply, and generally to aid in implementing the Act with respect to any class of transactions exempted pursuant to paragraph (a) of this section and Supplement II, the Board pursuant to sections 105 and 123 hereby prescribes that:
>
> (1) No such exemption shall be deemed to extend to the civil liability provisions of sections 130 and 131; and
>
> (2) After an exemption has been granted, the disclosure requirements of the applicable State law shall constitute the disclosure requirements of this Act, except to the extent that such State law imposes disclosure requirements not imposed by this Act. Information required under such State law with the exception of those provisions which impose disclosure requirements not imposed by this Act shall, accordingly, constitute the 'information required under this chapter' (Chapter 2 of the Act) for the purpose of Section 130(a)."

The Grant Company claims that 12 C.F.R. §226.12(c) (1970) exceeds the parameters of the Federal Reserve Board's discretion. The Company's burden of sustaining this assertion is heavy indeed. In N.C. Freed Company vs Board of Governors of the Federal Reserve System, 473 F.2d 1210, 1217 (2nd Cir. 1973), this Court held:

> "[S]ince the regulation constitutes a contemporaneous construction of a statute by the agency charged by Congress with the administration of the Act, the Board's construction is entitled to deference."

See, also, Mourning vs Family Publications Service, 411 U.S. 356 (1973); American Airlines, Inc. vs Remis Industries, Inc., 494 F 2d 196 (2nd Cir. 1974); Lewis vs Martin, 397 U.S. 552, 559 (1970); Connecticut State Department of Public Welfare vs. Department of Health, Education and Welfare, 448 F 2d 209, (2nd Cir. 1971). The consumer submits that Grants has utterly failed to satisfy this burden.

On April 4, 1975, the Board of Governors of the Federal Reserve System filed a brief amicus curiae expressing its views on the jurisdictional issues raised in the case of Ives vs W. T. Grant Co., Docket No. 74-2131. The jurisdictional issues in Ives are identical to the issues herein. The consumer therefore refers the Court to the FRB amicus curiae brief and hereby incorporates such arguments by reference herein.

In enacting truth-in-lending, Congress relied heavily on "the Board of Governors of the Federal Reserve System. No one can deny their experience and expertise in these matters." H. R. Rep. No. 1040, 90th Congress, 1st Sess. (1967), p. 18. Reviewing the legislative history, the Supreme Court stated:

> "To accomplish its desired objective, Congress determined to lay the structure of the Act broadly and to entrust its construction to an agency with the necessary experience and resources to monitor its operation. Section 105 delegated to the Federal Reserve Board broad authority to promulgate regulations necessary to render the Act effective. The language employed evinces the awareness of Congress that some creditors would attempt to characterize their transactions so as to fall one step outside whatever boundary Congress attempted to establish. It indicates as well the clear desire of Congress to insure that the Board had adequate power to deal with such attempted evasion. In addition to granting to the Board the authority normally given to administrative agencies to promulgate regulations designed to 'carry out the purposes' of the Act, Congress specifically provided, as noted earlier, that the regulations may define classifications and exceptions to insure compliance with the Act. See supra, at 361-362.1

1"The [Federal Reserve] Board shall prescribe regulations to carry out the purposes of [the Act]. These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper...to prevent circumvention or evasion [of the Act], or to facilitate compliance therewith." (15 U.S.C. §1604). Mourning v. Family Publications Service, Inc., supra, 411 U.S. at 361, 362.

> "The Board was thereby empowered to define such classifications as were reasonably necessary to insure that the objectives of the Act were fulfilled..." Mourning vs Family Publications Service, supra, 411 U.S. at 365, 366.

Prior to the effective date of §226.12(c), the Board explained the proposed regulation in its annual report to Congress for the year 1969:

> "The Board believes that after an exemption for classes of transactions within a State has been granted, customers should have continued access to Federal or State courts in seeking redress for alleged violations of the disclosure provisions of State statutes, including the right to rely upon Federal or State rules relating to class actions. Accordingly, the Board has published for public comment...a proposed amendment to Regulation Z which would provide that no exemption shall be construed to extend to the civil liability provisions of sections 130 and 131 of the Act. The effect of this amendment would be to substitute the applicable disclosure requirements of State law for the requirements of Chapter 2 of the Act following an exemption, thus retaining a basis for liability in the Federal courts." Board of Governors of Federal Reserve System, Annual Report to Congress on Truth In Lending for the Year 1969, p.5. 1a

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1a
In practical terms, the Board has explained that "After an exemption has been granted, criminal and administrative responsibility would be under State control with respect to such exempted transactions." 35 Fed. Reg. 5214, 5215 (1970).

Congress has surely ratified the Board's interpretation of the Act's exemption statute, 15 U.S.C. §1633. Each year the Board must advise Congress of its policies and activities with respect to exempted transactions. 15 U.S.C. §1613. The consumers are not aware of a single congressional challenge to 12 C.F.R. §226.12(c). Indeed, recent amendments to the Truth In Lending Act, P.L. 93-495 (1974), refuse to alter the Board's interpretation of 15 U.S.C. §1633. The new Act's profound emphasis on class actions[2] as a means of inducing compliance with truth-in-lending vindicates the Board's decision to assure a federal forum; for, pursuant to §226.12 (c), the Board guaranteed consumers "the right to rely upon Federal or State rules relating to class actions." Board of Governors of Federal Reserve System, Annual Report to Congress on Truth In Lending for the Year 1970, p. 6 (1971); Id. for the Year 1969, p. 5 (1970).

Despite the Grant Company's argument that Congress required the Board to be wholly unconcerned about exempted states' administration of the Act, the Board regularly informs Congress of the quality and adequacy of enforcement by exempted states. E.g., Board of Governors of Federal Reserve System, Annual Report to Congress for the Year 1973,

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See, E.g., S.Rep. No. 93-278, 93rd Cong., 1st Sess., pp. 14-15 (1973).

pp. 4-5 (1974). Any lesser vigilance by the Board would indeed be surprising; for Truth In Lending was the product of six years' tenacious effort by a congressional group of consumer advocates committed to an effective bill. E.g., Hearings on H.R. 11601 before the Subcommittee on Consumer Affairs of the Committee on Banking and Currency, House of Representatives, 90thCong., 1st Sess., pp. 158-181 (1967) (Paul Douglas); Mourning vs. Family Publications Service, supra. Indeed, the Board's continuous monitoring of exempted states demonstrates that, even with respect to exempted transactions, federal power and federal law remain the locus of authority. The consumer is unaware of a single congressional complaint that the Board's monitoring activities exceed its powers.

This Court should adhere to the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction." Red Lion Broadcasting Co. vs F.C.C., 395 U.S. 367, 381 (1969). Deference to this principle requires that this Court sustain the District Court's jurisdiction.

C. THE LEGISLATIVE HISTORY OF TRUTH IN LENDING DEMONSTRATES THAT 12 C.F.R. §226.12(c) IS NOT INCONSISTENT WITH THE PURPOSES OF THE ACT.

In arguing that 12 C.F.R. §226.12 exceeds the Board's powers, Grants relies exclusively on Senate hearings, Senate debates and Senate reports, and remarks at these hearings by Governor Robertson of the Federal Reserve Board. Such reliance is misplaced. The Senate Committee on Banking and Currency reported a bill, passed by the full Senate and pursuant to the recommendation of Governor Robertson, which lacked any provision for administrative enforcement, e.g., 114 Cong. Rec. 14489-14490 (1968) (Sen. Proxmire); which viewed the private civil action as virtually the sole vehicle for inducing compliance with the Act, S. Rep. No. 392, 90th Cong., 1st Sess., p. 9 (1967); and which therefore accorded the Board no role in determining the effectiveness of administrative enforcement in exempted States, id. at 21. Each of these positions was decisively rejected by the House; by the conference committee formed as the result of the House-Senate disagreement; and in the Act upon final passage.

In House deliberations, occurring after the Senate's passage of its bill, a provision for administrative enforcement was considered for the first time. See, e.g., Hearings on

H.R. 11601, supra, pp. 28-35. Despite the Senate's contrary position, the House decreed administrative enforcement the primary means of inducing compliance with the Act. H. R. Rep. No. 1040, 90th Cong., 1st Sess., P. 18 (1967). In so deciding, the House rejected Governor Robertson's views that administrative enforcement was unnecessary; and similarly rejected the Senate's explicit reliance on those views.3 The House passed the direct lineal ancestor of 15 U.S.C. §1607, providing for administrative enforcement primarily by the Federal Trade Commission. 114 Cong. Rec. 1601, 1855 (1968); H. R. Rep. No. 1040, supra, pp. 18-19.

To resolve the House-Senate conflict a conference committee was designated. 114 Cong. Rec. 2550-2555, 2736 (1968). The conference committee's report rejected the position of the Senate and Governor Robertson, and supported the House. E.g. 114 Cong. Rec. 14382, 14387 (remarks of Rep. Sullivan: "On administrative enforcement of the disclosure requirements, the House provision prevails. The Senate had passed what was, in effect, a self-enforcement measure..."); 14489, 14490 (Sen. Proxmire).

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3 Governor Robertson's opposition to administrative enforcement was expressed in both the House hearings, p. 146, and the Senate hearings, see Appellant's Brief, pp. 8-10, in Docket No. 74-2131. See also, Hearings on H.R. 11601, supra, at 128. The Senate report explicitly adopting Governor Robertson's views is reproduced at page 10 of Appellant's Brief, in Docket No. 74-2131.

Moreover, portions of the Senate legislative history demonstrate that the original Senate version contemplated a broad grant of discretion to the Board consistent with the issuance of the "partial" exemption so opposed by the Company. The Senate Committee held that its version "would give the Federal Reserve Board the authority to exempt creditors from complying with all or parts of the bill..." S. Rep. 392, 90th Cong., 1st Sess. p. 8 (1967) (emphasis added). Additionally the Committee explained that the Act "permits the Board to exempt creditors..." Id. at 21 (emphasis added). Clearly, the Senate version accorded the Federal Reserve Board the freedom to exercise its discretion in such manner as would assure effectuation of the Act's purposes, 15 U.S.C. §1601. The Board's regulation, 12 C.F.R. §226.12(c) does precisely that.

An emasculated interpretation of the scope of the Board's authority would indeed be anomalous, in view of Congress' overwhelming concern that the Act be effectively administered and enforced. E.g., Mourning vs Family Publications Service, supra.

The full Congress thus decisively rejected the Senate's original position on administrative enforcement. The Senate hearings, Senate committee report, and the rejected views of Governor Robertson are therefore singularly unpersuasive of the Grant Company's proposition that the Board's regulation, 12 C.F.R. §226.12(c), violates the Act.

D. IF THIS COURT INVALIDATES THE BOARD'S REGULATION, 12 C.F.R. §226.12(c), THE CONSUMER'S CREDIT TRANSACTIONS WITH THE COMPANY ARE GOVERNED EXCLUSIVELY BY FEDERAL LAW, 15 U.S.C. §§1601 ET SEQ., AND FEDERAL JURISDICTION EXISTS PURSUANT TO 15 U.S.C. §1640(e).

The Board's exemption of certain Connecticut transactions was granted pursuant to its regulation, 12 C.F.R. §226.12(c). See, 35 Fed. Reg. 11992 (1970). If this Court invalidates §226.12(c), then the basis for such exemption will have been eliminated. In that event, the exemption which the Board illegally granted must be deemed null and void. Ives vs. W. T. Grant Co., supra, App. 164a. The transaction at issue will thus be governed exclusively by federal law, 15 U.S.C. §§1601 et seq., with federal jurisdiction conferred by 15 U.S.C. §1640(e).

Therefore, even if this Court invalidates §226.12(c), the District Court properly accepted jurisdiction of the consumer's complaint.4

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4 The District Court's opinion explicitly held that the Company had violated 15 U.S.C. §1640. App. 19a.

II. THE DISTRICT COURT PROPERLY ENTERED SUMMARY JUDGMENT AS TO LIABILITY WITH RESPECT TO THE CONSUMER'S TRUTH IN LENDING CLAIMS.

The Plaintiff-Appellee moved for partial summary judgment on Count I of the Complaint. App. 14a. In her memorandum of law in support of the entry of partial summary judgment filed May 22, 1974, App 1a, the consumer contended:

> "The contracts do not comply with the requirements of truth-in-lending, to wit:
>
> a. The term "unpaid balance" is not used. Ives vs. W. T. Grant Co., supra, p. 13;
>
> b. The finance charge was not clearly, conspicuously, and meaningfully disclosed, Ives vs. W. T. Grant Co., supra, pp. 13-14;
>
> c. The Defendant failed to describe each amount included within the finance charge, Ives vs. W. T. Grant Co., supra."

The district court awarded partial summary judgment to the consumer for "defendant's failure on each occasion as a regulated creditor to comply with truth in lending requirements in respects previously discussed in Ives vs. W. T. Grant Co., Civil No. 15,125 (D. Conn. March 19, 1974)." App. 19a.

Contrary to the Company's contentions (Company's brief at 16), the district court did not hear or determine any alleged violations for:

> "4) the failure to disclose insurance premiums as an element of the finance charge, Conn. Reg. §§36-395-3(a)(5), 36-395-7(c)(8)(A);(12 C.F.R. §226.4(a)(5), 226.8(c)(8)(i); and
>
> 5) the failure to disclose the meaning and effect of the security interest clause, Conn. Reg. §36-395-7(b)(5); (12 C.F.R. §226.8(b)(5)."
>
> Company's brief at 16.

Neither of the above issues is involved in the present case. Therefore this brief will not respond to Sections II, D and II, E of the Company's brief.

A. THE W. T. GRANT COMPANY FAILED TO EMPLOY THE PRESCRIBED TERM "UNPAID BALANCE" IN VIOLATION OF THE TRUTH IN LENDING ACT.

The District Court specifically found that the Company's standard form coupon contracts did not employ the required term "unpaid balance". App. 19a. Ives vs. W. T. Grant Co., supra, App. 172a. The Company does not contest this finding of fact by the District Court. Connecticut Regulation §36-395-7(c)(5) [12 C.F.R. §226.8(c)(5)] requires Grants to employ the term "unpaid balance". Since this requirement is clear and unambiguous, the Company's failure to use the term "unpaid

balance" subjects it to liability under 15 U.S.C. §1640 and §36-407a of the Connecticut General Statutes.

The term "unpaid balance" is "the sum of the amounts determined under subdivision (3) "[unpaid balance of cash price"] and (4) "[all other charges individually itemized which are included in the amount financed, but which are not part of the finance charge"] of this subsection"... Conn. Reg. §36-395-7(c)(5) [12 C.F.R. §226.8(c)(5)]. On the Company's form contracts, Grant's substituted the term "Total of 3 plus 4", App. 17a, 18a, for the required term "unpaid balance'. The Federal Trade Commission has explained in In The Matter of Beauty Style Modernizers, Inc., 4 CCH Consumer Credit Guide, ¶98791, p. 88423, 88425 (1974):

> "The purpose of that statute is to permit the ordinary consumer, without regard to the degree of his commercial sophistication, to receive the kind of credit information that will allow him effectively to compare the credit terms being offered in the marketplace and thus to 'shop' for the most favorable terms available. (15 U.S.C. §1601). Only uniform terms, universally used, would allow the kind of credit comparison mandated by the Act. (See Zale Corp. et al , 78 FTC 1195, 1223 (1971); H.R. Rep. No. 1040, 90th Cong. 1st Sess. 13 (1967). The act was concerned not only with the substance of disclosure but, for purposes of consumer comparison shopping, was concerned as well with the form of that disclosure."

See also In The Matter of Zale Corp., et al, 78 FTC 1195 (1971), aff'd., 473 F.2d 1317 (5th Cir. 1972); In The Matter Of Charnita, Inc., 80 FTC 892 (1972), aff'd., 479 F. 2d 684 (3rd Cir. 1973) [5]

In the contract dated December 1, 1972, App. 17a, the "unpaid balance" would consist of $233.26 ("unpaid balance of cash price") plus $964.13 (the other charges included in the "amount financed") for a total of $1197.39. In the contract dated December 13, 1972, App. 18a, the "unpaid balance" would consist of $160.79 ("unpaid balance of cash price") plus $1197.39 (the other charges included in the "amount financed") for a total of $1358.18. Thus, the amounts required to be disclosed under the term "unpaid balance of cash price" and "unpaid balance" are different as a matter of fact and both must be disclosed.

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[5] The Federal Trade Commission was charged by Congress with a broad range of administrative enforcement responsibilities for Truth In Lending. 15 U.S.C. §1607(c).

The Federal Trade Commission has enforced administratively the failure by creditors to employ the term "unpaid balance". Indeed, consent orders have been approved where the term was not employed, e.g. Seattle Mobile Homes, Inc. dba Pacific Mobile Homes 78 FTC 340, 345 (1971); McMahons Furniture Enterprises, et al 81 FTC 104, 123 (1972).

On September 19, 1974, in FRB staff letter No. 842 [6] Jerauld C. Kluckman, Chief, Truth In Lending Section, explained:

> "[Y]our letter of February 8, in which you solicited our comments on whether the term unpaid balance is a required disclosure under §226.8(c) [¶3567] of Regulation Z where there are "other charges" but no prepaid finance charge or required deposit balance involved in the credit transaction. Your inquiry included two U.S. District Court cases which have held that the term in question is a required disclosure: Welmaker vs W. T. Grant Co. [CCH Consumer Credit Guide ¶98,774] and Mitchell vs Dixie Furniture Company, both from the Northern District of Georgia, Atlanta Division; neither of these cases has been appealed.
>
> In addition to the two cited court decisions, the Federal Trade Commission staff has concluded that the term unpaid balance is a required disclosure when the transaction involves "other charges" included in the amount financed but not part of the finance charge (see CCH ¶30,705).

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The legal effect of these informal staff opinion letters is advisory. The Senate Committee report accompanying the recent amendments to the Truth In Lending Act, P.L. 93-495, §406, explained: "In order to confer immunity from civil liability, the rule, regulation or interpretation thereof must be approved by the Board itself and not merely by the staff of the Board." S. Rep. 93-278, 93rd Cong. 1st Sess. p. 13 (1973).

> We appreciate your view that the definition of the term amount financed leaves little doubt as to what it includes on a disclosure statement. However, use of the term unpaid balance does offer some assistance to the consumer in understanding the mathematical progression on the Truth In Lending disclosure statement. Therefore, in view of the recent court decisions and other Federal agency opinions, we would advise creditors to incorporate the term into disclosure statements, even though the disclosure statement illustrated on page 22 of the pamphlet, What You Ought To Know About Truth In Lending, may indicate that such a disclosure may not be required in such circumstances.
>
> Finally, you suggest as a response to the two decisions cited, that the Board amend §226.8(c) and make use of the term unpaid balance optional to the creditor where there are no prepaid finance charges and required deposit balances. For the reason cited in the preceding paragraph, we feel that on balance it would not be appropriate to recommend to the Board an amendment to the Regulation in this respect at this time."
>
> 4 CCH Consumer Credit Guide ¶31,165, p. 66, 521.

See also Excerpts from FTC Informal Staff Opinion Letter of July 21, 1971 by Alan M. Silbergeld, Attorney, Division of Special Projects, CCH Credit Guide ¶30,705, pp. 66,307-66,308. The Company's reliance on Ivey vs Atlanta Gas Light Company, __F Supp.__ (N.D. Ga. 1974) CCH Consumer Credit Guide ¶98,704 is thus misplaced.

Under the uncontraverted facts presented herein, the use of the term "unpaid balance" was not superfluous, but rather required. Mrs.

D'Agosta respectfully requests that the grant of partial summary judgment on the issue of Grant's failure to employ the term "unpaid balance" be affirmed.

B. THE W. T. GRANT COMPANY FAILED TO DISCLOSE THE FINANCE CHARGE IN ADD-ON COUPON CONTRACTS IN A CLEAR, CONSPICUOUS AND MEANINGFUL MANNER.

The district court found that the W. T. Grant Company failed to disclose the finance charge on the two add-on contracts in a clear, conspicuous and meaningful manner. App. 19a; Ives vs W. T. Grant Co., supra, App. 182-183a, 172a. Grants argues (Appellant's Brief, pp. 20-22) that the district court erred by entering summary judgment because of the alleged existence of a genuine issue of fact. The Company produced no evidence in the district court. See Rule 56(e), F. R. Civ. P. In this appeal, the Company points to no competent evidence to controvert the district court's finding. Ample authority supports the entry of summary judgment. Mourning vs Family Publications Service, Inc., 411 U.S. 356 (1973); Palmer vs Wilson, 502 F.2d 860 (9th Cir. 1974); Welmaker vs W. T. Grant Co., 365 F. Supp. 531 (N.D. Ga. 1973).

The Company next argues (Appellant's Brief, pp. 23-25) that the district court erred as a matter of law by entering summary judgment. Clearly, the court's decision was correct.

The Company discloses the unlabelled "net finance charge" far more prominently than the actual finance charge (App. 17a, item 8(a)), on the Company's standard form contract. The district court in Welmaker vs W. T. Grant Company, supra, 365 F. Supp. at 535, reasoned:

> "...the positioning of the unlabelled 'net finance charge' in relation to the required 'finance charge' serves only to confuse the customer and clearly detracts attention from the required disclosures; the total finance charge. The resultant confusion and distraction defeats the purpose of the Act by diminishing, if not preventing, the consumer's conceptualization of what the entire transaction is costing him. He is left with no clear and unambiguous ground for comparison credit shopping." 7

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The December 1, 1972 contract (App. 17a) discloses an amount financed of $1197.39 (item 7) and a finance charge of $388.49 (item 8(a)) "less rebate $243.09 equals $145.40." Instead of disclosing the finance charge of $388.49 prominently underneath the "Amount Financed" of $1197.39, and in the column where all the other numerical disclosures are made, Grants discloses the finance charge off to the left of that column, in a smaller space. In the space where the format of the contract leads one to expect disclosure of the finance charge, Grants instead discloses the unlabeled "net finance charge" of $145.40. Thus, the natural result of Grants' arrangement of the disclosed figures is to view the $145.40 "net finance charge" as the genuine finance charge since it is disclosed far more prominently than the actual finance charge of $388.49.

C. THE W. T. GRANT COMPANY FAILED TO DESCRIBE PROPERLY EACH AMOUNT INCLUDED IN THE FINANCE CHARGE.

The district court found that the Company did not describe "each amount included" in the total amount of the finance charge, in violation of Conn. Reg. §36-395-7(c)(8)(A) [12 C.F.R. §226.8 (c)(8)(i)], App. 19A; Ives vs. W. T. Grant Co., supra, App. 172a, 173a. The only exception created by Regulation Z to this requirement is the sale of a dwelling, where the finance charge need not be stated. Id.

The amount of the finance charge is determined as the sum of all specified charges imposed directly or indirectly by the creditor. Conn. Reg. §36-395-3(a), 12 C.F.R. §226.4(a). The consumer submits that the Ives decision was correct when it explained:

> "Perceiving no meaningful mode of 'description of each amount included' absent individual identification, the Court agrees with plaintiffs that itemization is required. If defendant is correct in further asserting that its finance charge is composed of but one element, a purported 'time-price differential', that characterization should be spelled out on the face of the contract;" Ives v. W. T. Grant Co., supra, App. 173a.

Other district courts have agreed with the district court's reasoning in Ives. Meyers vs Clearview Dodge Sales, Inc., 384 F Supp. 722, 726 (E.D. La. 1974); Johnson vs Associates Finance Inc., 369 F. Supp. 1121, 1122 (S.D. Ill, 1974). Cf., Ljepava vs M.L.S.C. Properties, Inc. 511 F.2d 935, 942 (9th Cir. 1975). See also 40 Fed. Reg. No. 57, p. 13009 (3/24/75) (proposed form, item 2, showing the recommended mode for disclosure of the elements of the finance charge.)

The description of each amount included in the finance charge obviously assists the consumer to shop for the best credit terms available. Cf., Mourning vs Family Publications Service, Inc., supra, 411 U.S. at 363, 369. If the consumer is informed that the merchant intends to perform a credit investigation at a cost of $25.00, he may be able to convince the merchant that there is no need for such an investigation, thus reducing the total amount of the finance charge. If informed that the finance charge is composed solely of interest, the customer would be better able to bargain for a lower rate, perhaps at his credit union where his shares could be pledged as security for the loan. If the savings and loan association were to charge 19.90% interest, as did Grants, the consumer would likely question whey he received but 5 1/4% on his passbook savings. The opportunities for discussion, education and bargaining are obvious, and limited only by human ingenuity. Such is the explicit purpose of Truth In Lending, 15 U.S.C. §1601.

The Company argues that the district court must be reversed based on a staff letter from an advisor to the Federal Reserve Board. Mr. Garwood's letter, reproduced in part on p. 26 of Appellant's Brief, 8 simply announces that "the requirement of

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Defendant's quotation of the Garwood letter on p. 26 omits the first five words of the lead sentence of the quoted paragraph: "In the situation you describe..." CCH ¶30,972.

disclosure of 'each amount included' is applicable only where the total amount of the Finance Charge includes more than one component". He does not explain the source of this opinion, nor the reasons for an exception to an otherwise clear and unambiguous regulation. We are not provided with a copy of the letter of inquiry, the facts underlying the inquirer's credit transactions nor the inquirer's disclosure form. Judge Frankel in a similar context explained:

> "There is much debate in the papers now about the weight to be given to this attorney's opinion. It is not, and is not claimed to be, the position of the Board itself. The parties, after a flurry of epistolary sparring, have each gotten, and given the court, closely similar letters from the Board's Deputy Secretary about the protocol of all this. That official says not surprisingly, that a letter from any particular official like the attorney in question 'represents the informed view of the particular official***.' He goes on in his letter to defendant's counsel to say:
>
> 'It is the Board's view that the public is entitled to rely on a formal staff opinion unless and until it is altered by the Board after formal consideration. Where the issue involves a statement of legal position, it may be assumed that while the question discussed has not been presented to, nor reviewed by the Board, such view is believed by the staff to be legally sound and judicially (sic) sustainable, and would be recommended by the staff for Board adoption should the matter be presented to the Board. However, in view of the pending litigation involving the issue discussed in the staff letter of November 28, 1969, the Board deems it inappropriate to examine at this time the opinion contained in that letter and therefore is not able to comply with your request.'

> "The upshot of all that is briefly stated: defendant disclaims reliance on the Board attorney's letter as the basis for its initial (since altered, see infra) practice of not disclosing annual rates in the absence of a finance charge. On its merits, the attorney's letter is a brief, conclusory statement rested upon what this court, with deference, finds to be insufficient analysis of the pertinent materials. Without discoursing at length on its 'weight', the position it espouses has been rejected." Ratner vs Chemical Bank New York Trust, 329 F. Supp. 270, 278-279 (S.D.N.Y. 1971).

Grants cannot claim that it relied on Mr. Garwood's letter to draft its form because the letter was not then in existence. To the extent that Grants contends that this letter creates an additional exception to 12 C.F.R. §226.8(c)(8)(i), [Conn. Reg. §36-395-7(c)(8)(A)]. for alleged single-element finance charges, said letter would be invalid under Section 4 of the Administrative Procedure Act, 5 U.S.C. §553. Cf., Continental Oil Co. vs Burns, 317 F. Supp. 194, 196-7 (D. Del. 1970).

The Company's reliance on Adams vs New Haven U.I. Federal Credit Union, __F Supp.__ (D. Conn. 1975) is misplaced. The court held that a reassessment of the Ives decision was unnecessary because ..."defendant's identification of the single finance charge component as interest is sufficiently 'spelled out on the face' of the loan form, Ives vs W. T. Grant Co., supra". Brief of Appellant, Appendix B-5.

The Company offered no evidence to the district court in opposition to summary judgment to show that the identification of the element(s) of the finance charge "is sufficiently spelled out on the face" of the contract. Nor does Grants claim that it did identify such element(s) to Mrs. D'Agosta.

III. THE COMPANY'S FAILURE TO RAISE ITS CLAIMS OF LAW IN THE DISTRICT COURT BARS IT FROM LITIGATING SUCH CLAIMS ON APPEAL.

It is settled law that the failure of a party to pursue claims of law at the trial level bars it from raising such claims on appeal. Although the taking of formal exceptions is not required, Rule 46, F.R. Civ. P., "points not raised and preserved below will not be considered on appeal unless they amount to 'fundamental error.'" 1B Moore's Federal Practice §0.404[9], p. 551 (1975 ed.). See, also, 5A id, §46.02, pp. 1902-1909. Compare, Rule 56(e), Fed. R.Civ.P.

The Company's claims, raised in its brief on appeal, were not pursued in the district court. Indeed, the Company failed to oppose the consumer's motion for summary judgment, having filed neither affidavit nor memorandum of law in opposition thereto. Under these circumstances, no "fundamental error" being present in the court's decision, the Company has waived its right that this court consider its claims of law.

CONCLUSION

For the foregoing reasons, the decision and judgment of the district court should be affirmed in all respects.

Respectfully submitted,

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Dated: June 9, 1975

CERTIFICATION:

This is to certify that a copy of the foregoing was mailed, postage prepaid, to:

William J. Egan, Esquire
Wiggin & Dana
205 Church Street
New Haven, Connecticut 06508

on this 9 day of June, 1975.

William H. Clendenen, Jr.